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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY et al., Plaintiffs, - v - COUNTRYWIDE FINANCIAL CORPORATION et al., Defendants.	Case No. 2:11-cv-07166 Hon. Mariana R. Pfaelzer
NATIONAL INTEGRITY LIFE INSURANCE COMPANY, Plaintiffs, - v - COUNTRYWIDE FINANCIAL CORPORATION et al., Defendants.	Case No. 2:11-cv-09889 Hon. Mariana R. Pfaelzer

MEMORANDUM OF POINTS OF AUTHORITY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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TABLE OF AUTHORITIES

The Western and Southern Life Insurance Company, Western-Southern Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, and Fort Washington Investment Advisors, Inc. (collectively, "Western & Southern"), plaintiffs in *The Western and Southern Life Insurance Company et al. v. Countrywide Financial Corporation et al.*, No. 11-CV-7166-MRP (the "Western & Southern Action"), and National Integrity Life Insurance Company ("National Integrity"), plaintiff in *National Integrity Life Insurance Company v. Countrywide Financial Corporation et al.*, No. 11-CV-9889-MRP (the "National Integrity Action"), respectfully submit this memorandum of points of authority and the Declaration of Brian C. Lysaght, dated January 13, 2012 ("Lysaght Decl."), in opposition to Countrywide's,[1] Bank of America's[2] and the Officer Defendants'[3] motions to dismiss. *See* Western & Southern Action Dkt. Nos. 152, 154, 158, 162, 164, 168, 170, 171; National Integrity Action Dkt. Nos. 47, 49, 52, 56, 58, 59, 60, 62.[4]

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[1] References to "Countrywide" are to defendants Countrywide Financial Corporation ("Countrywide Financial"), Countrywide Home Loans, Inc., Countrywide Capital Markets, LLC, Countrywide Securities Corporation ("Countrywide Securities"), and CWALT, Inc., CWABS, Inc., CWHEQ, Inc., and CWMBS, Inc.

[2] References to "Bank of America" are to defendants Bank of America Corporation, Bank of America, N.A., BAC Home Loans Servicing, LP ("BAC Servicing"), and NB Holdings Corporation.

[3] References to the "Officer Defendants" are to defendants Angelo Mozilo, David Sambol, Eric Sieracki, Ranjit Kripalani, Stanford Kurland, David A. Spector, N. Joshua Adler, and Jennifer Sandefur.

[4] Bank of America and the Officer Defendants have joined in Countrywide's motion to dismiss. As a result, the points of authority set forth in this memorandum apply equally to each Defendant's motion to dismiss.

PRELIMINARY STATEMENT

Defendants' motions to dismiss should be denied because they are based on the faulty premise that the Western & Southern Action and the National Integrity Action are substantially identical to certain cases already considered by this Court. Aside from the identity of Defendants and some overlapping evidence concerning their misconduct, the instant actions bear little resemblance to those previously considered lawsuits.

First, unlike any of the prior actions, the Western & Southern Action and the National Integrity Action assert claims under the Ohio Corrupt Activities Act (the "OCAA"). Defendants concede that these claims are timely.

Second, the Western & Southern Action and the National Integrity Action assert claims under the Ohio Securities Act (the "OSA") and common law fraud that are based on misrepresentations and other misconduct not before this Court in any of the prior actions. For example, Plaintiffs allege that Countrywide misrepresented to investors that promissory notes and loan files were properly transferred and mortgages properly assigned to securitization trusts. These steps were necessary to ensure that the Countrywide-sponsored securitization trusts could foreclose in the event of a borrower default. As detailed in the Complaints,[5] as well as in recent actions by multiple state attorneys general, Countrywide in fact consistently failed to meet rules governing assignment of mortgages, and transfer of promissory notes and loan files. Countrywide does not contest that Plaintiffs could not have known of this misconduct prior to September 2010. Defendants thus concede that Plaintiffs' OSA and common law fraud claims based on transfer and assignment misrepresentations are timely.

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[5] References to the "Complaints" are to the Amended Complaint in the Western & Southern Action and the substantially similar Complaint in the National Integrity Action.

Third, unlike any of the prior actions, the Western & Southern Action and the National Integrity Action allege that from 2007 through at least June 2009, Countrywide and Bank of America (after its acquisition of Countrywide) provided Remittance Reports[6] for Plaintiffs to use in monitoring their Countrywide mortgage-backed securities ("MBS") certificates (the "Certificates"). Unbeknownst to Plaintiffs, the Remittance Reports falsely portrayed material aspects of loan pools underlying the Certificates. This disinformation led Plaintiffs to believe that virtually all of the Certificates were performing well and would make all expected principal and interest payments. As a result, the principles of equitable estoppel and fraudulent concealment require tolling of the limitations periods on Plaintiffs' common law fraud claims and certain of Plaintiffs' Exchange Act and OSA claims.

Fourth, Plaintiffs assert arguments relating to *American Pipe* tolling that have not been previously submitted to this Court. Plaintiffs own a number of tranches that are backed by the same loan pools as those at issue in *Luther v. Countrywide Home Loans Servicing LP,* BC380698 (Cal. Super. Ct.) ("*Luther*"). As this Court is aware, *Luther* has been reinstated. The Court appears not to have had the opportunity to consider the long line of Circuit Court rulings that when a class action is reinstated, class members' claims are tolled as if the class claims had never been dismissed. In addition, the Court has yet to consider whether Western & Southern is entitled to tolling under the decision of the Ohio Supreme Court in *Vaccariello v. Smith & Nephew Richards, Inc.* 94 Ohio St. 3d 380 (Ohio 2002) ("*Vaccariello*"). As described below, *Vaccariello* requires that Western & Southern be allowed at least one year from this Court's dismissal of the First

[6] References to "Remittance Reports" are to the loan tapes and statistical matrices described in Paragraphs 375 and 380 of the Complaints.

Amended Complaint in *Maine State Retirement System v. Countrywide Financial Corporation*, No. 10-CV-0302-MRP ("*Maine State*") on November 4, 2010 to assert their Ohio state law claims.

In sum, Defendants' motions to dismiss are based on little more than an unsupported mantra that the Western & Southern Action and the National Integrity Action are virtually identical to prior actions dismissed by this Court. In fact, there are numerous and highly substantial differences between the instant lawsuits and the prior actions, and Plaintiffs respectfully submit that those differences require that Defendants' motions to dismiss be denied.

BACKGROUND

I. Plaintiffs and Their Purchase of Countrywide MBS

Five of the six Plaintiffs in the present actions are mutual life insurance companies. Complaints ¶ 2.[7] Mutual insurers are subject to state insurance regulations including capital requirements that effectively limit the types of such insurers' investments. *Id.* Plaintiffs generally purchased only senior "Class A" Certificates rated triple-A or the equivalent, seeking securities with stable principal and interest payments that would allow them to comply with insurance regulatory capital requirements. *Id.* Plaintiffs diligently analyzed expected cash flows under the Certificates for valuation, regulatory and accounting purposes. Until mid-2009, Plaintiffs used a propriety monitoring system developed with input from Countrywide for this purpose. *Id.* ¶¶ 374-75.

From June 2005 to March 2008, Plaintiffs purchased $541 million of Countrywide-sponsored MBS (Western & Southern $447 million, and National

[7] The sixth plaintiff is Fort Washington Investment Advisors, Inc., a registered investment advisor acting on behalf of Fort Washington Active Fixed Income LLC. Western & Southern Am. Complaint ¶ 19.

Integrity $94 million). Complaints, Ex. A. The Certificates were issued in 32 separate offerings; Western & Southern purchased certificates in all 32 offerings, and National Integrity purchased in 24. *Id.* ¶ 11. In total, Plaintiffs bought Certificates in 37 tranches (Western & Southern in 36 tranches, and National Integrity in 26). *Id.* ¶ 373.

The Certificates are generally situated at senior levels in the capital structure of their respective offerings. Indeed, 33 of Plaintiffs' 37 tranches are so called "Class A" certificates at or near the top of the payment waterfall, *id.* ¶ 373, and 34 tranches were rated triple-A or the equivalent at the time of purchase, *id.* Ex. C.

The Certificates did not suffer any diminution in interest or principal payments prior to February 2010, and only 6 of the 37 tranches have experienced such shortfalls since that time. *Id.* ¶ 384.[8]

II. The Complaints

A. Procedural History

On April 27, 2011, Plaintiffs filed a complaint in the Southern District of Ohio against Countrywide, Bank of America, and the Officer Defendants asserting claims under the Securities Act, the Exchange Act, the OSA, and Ohio common law. On November 8, 2011, after this action had been transferred to the Countrywide MBS MDL, Western & Southern filed an Amended Complaint dropping National Integrity as a party, and adding claims under the Ohio Corrupt Activities Act (the "OCAA") and for civil conspiracy.

On November 9, 2011, National Integrity filed its own action in the Southern District of New York. The National Integrity Complaint is substantially

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[8] The National Integrity Complaint inaccurately alleges that six of National Integrity's tranches have experienced principal or interest shortfalls. National Integrity Complaint ¶ 384. In fact, National Integrity has experienced shortfalls with respect to five tranches, all of which are also held by Western & Southern.

similar to the Western & Southern Amended Complaint. National Integrity ensured that the MDL Panel learned of its New York action, and, as a result, the Panel transferred the National Integrity Action to the Countrywide MBS MDL on November 30, 2011.

B. Plaintiffs' Misrepresentation and Omission Claims

The Complaints assert that Countrywide made multiple misrepresentations and omissions in registration statements, prospectuses, prospectus supplements, data compilations, and loan tapes concerning the Certificates (collectively, the "Offering Materials"), an in the monthly Remittance Reports Countrywide prepared following the offerings. The Complaints identify five categories of these misrepresentations and omissions:

- Misrepresentations and omissions concerning adherence to prudent underwriting guidelines. Complaints ¶¶ 76-130.
- Misrepresentations and omissions concerning the transfer of notes and loan files and assignment of mortgages to the trusts. *Id.* ¶¶ 197-242.
- Misrepresentations and omissions regarding Countrywide's property appraisal practices. *Id.* ¶¶ 243-255.
- Misrepresentations and omissions regarding the Certificates' credit ratings. *Id.* ¶¶ 256-259.
- Misrepresentations and omissions regarding mortgage insurance and Countrywide's mortgage insurance kickback scheme. *Id.* ¶¶ 260-276.

Plaintiffs allege claims based on these misrepresentations and omissions under the OSA,[9] the Securities Act of 1933 (the "Securities Act"), the Securities

[9] Western & Southern and National Integrity assert claims under ORC §§ 1707.41 (Count I), 1707.44(B)(4) (Count II), 1707.44(J) (Count III), 1707.44(G) (Count IV), and 1707.43 (Count V).

and Exchange Act of 1934 (the "Exchange Act"), common law fraud, civil conspiracy and negligent misrepresentation. Plaintiffs further allege that they could not have known of their claims based on Countrywide's failure to properly deliver original notes and loan files and assign mortgages until September 2010, Complaints ¶ 386, and could not have known of their other misrepresentation and omission claims prior to April 27, 2009. *Id.* ¶¶ 372-386.

C. Plaintiffs' OCAA Claims

The Complaints allege that Mozilo, Sambol, Countrywide, and Bank of America, along with certain unnamed parties, conducted the affairs of an association-in-fact enterprise through a pattern of corrupt activity in violation of the OCAA. Complaints ¶¶ 419-420. This pattern of corrupt activity included Defendants' multiple violations of the OSA and a wide range of other misconduct. For example, Countrywide's principal loan originator, Countrywide Home Loans, approved any loan that could be off-loaded onto investors without regard to whether the loan complied with Countrywide's already lax underwriting standards. *Id.* ¶¶ 5, 62-74, 76-130. Where borrowers plainly could not repay loans Countrywide sought to foist upon them, Countrywide employees many times forged documents to create the appearance that the borrowers qualified for a loan. *Id.* ¶¶ 131-167. As another example, BAC Servicing routinely overcharged defaulting borrowers for services such as property inspection and maintenance. Complaints ¶¶ 189-195. BAC Servicing also engaged in a corrupt "force-placed" insurance scheme whereby it replaced homeowner insurance policies on defaulted properties with policies underwritten by an insurer owned by Bank of America at wildly inflated premiums. *Id.* ¶ 196. Bank of America continued the work of the enterprise by having its employees regularly commit perjury in foreclosure proceedings necessitated by Countrywide's failure properly to deliver notes and loan files, and to assign mortgages. *Id.* ¶¶ 209-240.

ARGUMENT

In deciding a motion to dismiss, "the Court must assume the plaintiff's allegations are true and draw all reasonable inferences in the plaintiff's favor." *Stichting Pensioenfonds ABP v. Countrywide Financial Corporation*, No. 10-CV-07275 MRP, 2011 U.S. Dist. LEXIS 91441, at *5 (C.D. Cal. Aug. 9, 2011) ("*Stitchting*"). A motion to dismiss must be denied if the complaint "'state[s] a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, __, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a 'probability requirement.'" *Id.* Accordingly, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (*quoting Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)).[10]

"[I]t is well-settled that statutes of limitations are affirmative defenses, not pleading requirements." *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003). Defendants bear a "considerable burden" on a motion to dismiss based on a statute of limitations defense. *Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 871 (9th Cir. 2008). Here, Defendants have not met that heavy burden.

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[10] As an MDL transferee court, this Court applies the law of the transferor court as to choice of law, and Ninth Circuit law as to interpretation of federal law. *See Bahn v. Korean Airlines Co. (In re Korean Air Lines Co.)*, 642 F.3d 685, 700 n.12 (9th Cir. 2011). As a result, Ohio choice of law rules apply to the Western & Southern Action, and New York choice of law rules to the National Integrity Action.

I. Plaintiffs' Claims are Timely

A. Defendants Concede the OCAA Claims Are Timely

Countrywide concedes that Western & Southern's and National Integrity's claims under the OCAA are timely.[11]

B. The OSA Claims Are Timely

OSA claims are timely if brought within "two years after the plaintiff knew, or had reason to know, of the facts by reason of which the actions of the person or director were unlawful." O.R.C. § 1707.43(B). In determining constructive notice under this provision, Ohio courts look to federal law and apply to OSA claims the standard set forth in *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010). *See In re Nat'l Century Fin. Enters.*, 755 F. Supp. 2d 857 at 868 (S.D. Ohio 2010). Under *Merck*, the limitations period for securities fraud does not begin to run until the plaintiff knew or should have known of all the elements of its fraud claims, including scienter. 130 S. Ct. 1784, 1796 (U.S. 2010). Countrywide does not dispute that, applying the *Merck* standard, Plaintiffs were not on constructive notice of their OSA claims until they knew or should have known facts alerting that each distinct misrepresentation was made with the requisite intent. *In re Nat'l Century Fin. Enters.*, 755 F. Supp. 2d at 869-70; *see also* Countrywide Mem. at 33.

1. The OSA Claims Based Upon Failure Properly to Transfer Notes and Files, and to Assign Mortgages Are Timely

Multiple state attorneys general have recently commenced actions against Bank of America or its agents alleging widespread misconduct in foreclosure proceedings due to Countrywide's failure properly to transfer notes and loan files, and to assign mortgages to securitizations trusts. *See Commonwealth of*

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[11] An OCAA claim is timely if brought (i) within five years "after the unlawful conduct terminates" or (ii) within five years after "the cause of action accrues," whichever date is later. O.R.C. § 2923.34(J).

Massachusetts v. Bank of America, N.A., No. 11-CV-4363 (Mass. Super. Suffolk Cty.); *In the Matter of Bank of New York Mellon v. Walnut Place LLC et al.*, No. 11-CV-05988-WHP (S.D.N.Y.). Similar allegations form the basis of a distinct set of Plaintiffs' OSA Claims, and that set of claims was not addressed in *Maine State*, *Stitchting*, or *Allstate Insurance Company v. Countrywide Financial Corporation*, No. 11-CV-05236-MRP, 2011 U.S. Dist. LEXIS 123844 (C.D. Cal. Oct. 21, 2011) ("*Allstate*").

The Complaints allege that Countrywide misrepresented that original mortgage notes and loan files would be delivered, and that mortgages would be properly assigned, to the securitization trusts that issued the Certificates. Complaints ¶¶ 197-242. The Offering Materials indicated that "each loan is secured by a valid lien on, or a perfected security interest with respect to, the Property." Complaints ¶ 205. Countrywide further represented:

> In connection with the transfer and assignment of a mortgage loan, the depositor will deliver or cause to be delivered to the trustee, or a custodian for the trustee, the mortgage file, which contains among other things,
>
> - the original mortgage note (and any modification or amendment to it) endorsed in blank without recourse, except that the depositor may deliver or cause to be delivered a lost note affidavit in lieu of any original mortgage note that has been lost;
> - the original instrument creating a first lien on the related mortgaged property with evidence of recording indicated thereon or a copy of such instrument; [and]
> - an assignment in recordable form of the mortgage or a copy of such assignment . . . .

Complaints ¶ 206 (quoting CWALT 2007-16CB Prospectus Supplement at S-39-S-40); *see also id.* ¶ 207 (reassuring statements regarding the use of the Mortgage Electronic Registration System).

The Complaints detail how these statements were false and misleading. Complaints ¶¶ 209-242. In many instances, the collateral did not properly secure the underlying loans and could not be efficiently realized because Defendants either lost, failed to timely create, or failed to timely deliver the paperwork necessary to prove title to the mortgages and the notes under state law. *Id.* For example, the Complaints cite testimony of a Countrywide employee that Countrywide did not make any attempt to transfer or endorse notes to securitization trusts. *Id.* ¶¶ 211-217. This testimony came to light only in November 2010. *See Kemp v. Countrywide Home Loans, Inc. (In re Kemp)*, 440 B.R. 624 (Bankr. D.N.J. Nov. 16, 2010).

The Complaints establish that Countrywide and Bank of America have engaged in pervasive acts of fraudulent "robo-signing" in an attempt to cover up the massive failure to deliver notes and loan files, and to assign mortgages. Complaints ¶¶ 218-40. Bank of America and BAC Servicing employ an army of "robo-signers" who execute tens of thousands of foreclosure affidavits a month, all of which falsely aver personal knowledge, and many of which lack valid documentation. *Id.* The Complaints detail numerous other acts of perjury and forgery in foreclosure proceedings by Countrywide and BAC Servicing personnel. *Id.* ¶¶ 229-40.

Countrywide does not dispute that Plaintiffs could not have known of Countrywide's systemic documentation failures prior to September 2010. *See* Complaints ¶ 386. Indeed, none of the complaints or press reports pre-dating September 2010 attached to the Request for Judicial Notice ("RJN") references

Countrywide's systemic failure properly to deliver notes and loan files, and to assign mortgages to the trusts. *See* Countrywide's RJN Exs. 71-95, 106-114.

Countrywide argues that the Complaints' "robo-signing" allegations cannot toll claims relating to Countrywide's fraudulent origination practices. *See* Countrywide Mem. at 36. But Plaintiffs' allegations concerning transfer of notes and loan files and assignment of mortgages do not concern merely "robo-signing" and are entirely unrelated to their allegations concerning loan origination guidelines. The misrepresentations concerning failure properly to transfer notes and loan files, and to assign mortgages to the trusts, and the vast "robo-signing" conspiracy to hide that failure, give rise to distinct claims dealt with in a distinct section of each Complaint. *See* Complaints ¶¶ 197-242.

a. Constructive Notice Must Be Assessed Individually For Each Category of Misrepresentation

When a prospectus contains multiple categories of misrepresentations, a court must independently assess the date that plaintiffs knew or should have known of *each* category of misrepresentation. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 402, 423-24, 429 (S.D.N.Y. 2005); *In re UltraFem Inc. Sec. Litig.*, 91 F. Supp. 2d 678, 693 (S.D.N.Y. 2000). Notice of one misstatement does not provide notice of all misstatements or claims. *See City of Painesville v. First Montauk Fin.*, 178 F.R.D. 180, 195 (N.D. Ohio 1998) (lawsuit involving same securities did not trigger OSA or federal limitations period because subsequent complaint alleged new and distinct fraud).

For example, in *UltraFem*, defendants argued that the plaintiffs were on notice of their Securities Act and Exchange Act claims because a news article disclosed facts concerning some, but not all, of the misstatements cited in the complaint. 91 F. Supp. 2d at 691-92. The court held that knowledge of some misstatements did not start the limitations period for claims relating to other

distinct misstatements, and that therefore claims based on misstatements that were not disclosed in the news report were timely. *Id.* at 693. In *Alstom*, the plaintiffs alleged that the defendants failed accurately to disclose costs associated with defective turbines and certain financing agreements. 406 F. Supp 2d at 421-24. Although the misrepresentations were in the same offering documents and made for the same fraudulent purpose, the court found that because the misrepresentations were "dissimilar" the plaintiffs had alleged two separate frauds. *Id.* 424-25. That the plaintiffs had notice of misstatements concerning the financing agreements could not cause claims based on the turbine misrepresentations to be untimely. *Id.* 424-25, 429.

Like the misrepresentations in *Ultrafem* and *Alstom,* Countrywide's distinct misrepresentations regarding delivery of notes, delivery of loan files, and assignment of mortgages have nothing to do with Countrywide's other misrepresentations concerning origination guidelines, property appraisals, credit ratings, or mortgage insurance. *Compare* Complaints ¶¶ 197-242 *with id.* ¶¶ 76-130 (misrepresentations concerning origination guidelines), *id.* ¶¶ 243-255 (misrepresentations concerning appraisals), *id.* ¶¶ 256-259 (misrepresentations concerning ratings), *id.* ¶¶ 260-276 (misrepresentations concerning mortgage insurance). Countrywide's failure properly to deliver notes and loan files, and to assign mortgages relates to securitization trust administration and loan servicing, not the fraudulent origination practices earlier considered by this Court. Moreover, that failure has caused and continues to cause harm arising out of foreclosure and loan restructuring delays that is wholly unrelated to origination practices.

Indeed, the parties advocating for the $8.5 billion loan put-back settlement in *In the Matter of Bank of New York Mellon v. Walnut Place LLC et al.*, 11-CV-05988-WHP (S.D.N.Y.) have emphasized that Countrywide's monumental documentation failures have severely harmed investors and threaten future injury

as well. *See* Lysaght Decl. Ex. 1 at 2 (servicing improvements and "document indemnity" agreed to in the settlement agreement could avoid billions of dollars of future investor losses).

That Countrywide made all the misstatements alleged in the Complaints in order to cause the Certificates to appear more attractive to investors does not negate the fact that notice of different misstatements—and thus different claims—accrued on different dates. *See Alstom*, 406 F. Supp 2d at 429. Accordingly, all of the OSA claims and common law based on the misstatements alleged in Section VII of the Complaints are indisputably timely. All of the Exchange Act claims are similarly timely to the extent not precluded by the applicable 5-year statute of repose.[12]

2. Western & Southern's OSA and Common Law Claims Based On Countrywide's Systemic Abandonment of Underwriting Guidelines Are Timely

Western & Southern filed this action on April 27, 2011. Accordingly, its OSA and Ohio common law fraud claims based on Countrywide's systemic abandonment of its underwriting standards are timely if Western & Southern did not have actual or constructive notice of its claims prior to April 27, 2009. *See* O.R.C. § 1707.43(B).[13]

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[12] While the *Stitchting* opinion mentions allegations regarding failure "to properly convey title to secondary purchasers," *Stitchting*, 2011 U.S. Dist. LEXIS 91441, at *22, the *Stitchting* opinions did not address the allegations concerning Countywide's systemic failure to deliver notes and loan files and assign mortgages. Indeed, none of the misrepresentations Plaintiffs allege relating to documentation failures were identified in the *Stitchting* complaint.

[13] Under O.R.C. § 2305.09(C), common law fraud claims must be brought within four years of discovery of the facts giving rise to the claim. The majority of Ohio intermediate appellate courts that have considered the issue have ruled that O.R.C.

None of this Court's prior limitations rulings in the Countrywide MDL have involved Ohio law or the OSA, and for that reason, none have had to take into account the unique policy objections of Ohio law and the OSA as regards limitations. Under Ohio law, statutes of limitations do not set forth fundamental rights, are considered remedial and procedural, and are to be liberally constructed so that whenever possible litigants will win or lose on the merits, and not on a procedural matter. *See, e.g., In re The Antioch Co.*, 456 B.R. 791, 848-49 (Bankr. S.D. Ohio 2011) (collecting cases).

Moreover, the OSA is intended "to prevent the fraudulent exploitation of the investing public through the sale of securities" and was "drafted broadly to protect the investing public from its own imprudence as well as the chicanery of unscrupulous securities dealers." *In re Columbus Skyline Securities*, 74 Ohio St.

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§ 1707.43(B) nevertheless applies to common law fraud claims arising out of the sale of securities. *See, e.g., Hater v. Gradison Div. of McDonald & Co. Secs. Inc.*, 101 Ohio App. 3d 99, 655 N.E.2d 189, 198 (Ohio Ct. App. 1st App. Dist. 1995). *But see DeChant v. Developers,* No. 37745, 1978 Ohio App. LEXIS 8128, at *12-14 (Ohio Ct. App. 8th App. Dist. Oct. 28, 1978). The Ohio Supreme Court has not yet ruled on the issue.

Plaintiffs submit that if the issue came before it, the Ohio Supreme Court would apply O.R.C. § 2305.09(C) to common law fraud claims arising out of the sale of securities. Section 2305.09(C) expressly provides that common law fraud claims are subject to a four-year limitations period, "except when the cause of action is a violation of [the Ohio identity theft statute]". Section 1707.40 of the OSA further provides that nothing in OSA is meant to "restrict common law liabilities for deception or fraud other than as specified" on the face of the statute. O.R.C. § 1707.40; *see also Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 2011 NY Slip Op 9162, at 4 (N.Y. Ct. App. Dec. 20, 2011) (state securities laws do not preempt common law claims absent clear legislative intent). Plaintiffs respectfully suggest that this Court should certify this question to the Ohio Supreme Court. *See* Ohio S. Ct. Prac. R. 18.1 ("The Supreme Court may answer a question of law certified to it by a court of the United States.").

3d 495, 498 (1996). Consistent with the OSA's broad remedial purpose, courts have ruled that conflicting public reports of wrongdoing are insufficient to put an OSA plaintiff on notice of its claims, *see In re Nat'l Century Fin. Enters.*, 755 F. Supp. 2d at 871; *Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App. 3d 366, 400-01 (Ohio Ct. App., Franklin County 2000), and that a prior lawsuit is similarly insufficient where the prior action involved different allegations of fraud, *see City of Painesville*, 178 F.R.D. at 195.

a. Press Reports Contradicted By Defendants Did Not Provide Constructive Notice

Countrywide attaches to its motion to dismiss eight press reports that it claims put Western & Southern on notice of OSA claims and common law based on Countrywide's abandonment of loan origination standards. *See* Countrywide RJN Exs. 106-113. But these press reports cannot be read in isolation, and when considered together with the total mix of information, they do not suggest that Western & Southern should have known of OSA claims and common law relating to systemic abandonment of origination guidelines more than two years prior to the filing of its lawsuit on April 27, 2011. As the press reports themselves demonstrate, any negative information concerning Countrywide was counterbalanced by Countrywide's public statements and other public information.

For example, Countrywide cites March 2008 reports that the FBI had commenced an investigation of Countrywide and other loan originators to determine whether they had made false statements regarding their financial condition and the quality of their mortgage loans. But the reports cited also indicate that Countrywide denied any knowledge of such an investigation. RJN Ex. 106; *see also id.* Ex. 109. Moreover, it was widely reported that after conducting due diligence on Countrywide, "Bank of America is rushing to close the Countrywide acquisition as quickly as possible." RJN Ex. 106. The fact that a

powerful and sophisticated financial institution such as Bank of America agreed—after exhaustive due diligence—to pay $4.1 billion for Countrywide more than counterbalanced press reports that Countrywide might be involved in some degree of improper origination activity.

Defendants also reference reports of fraud by one Mark Zachary. *Id.* Exs. 107, 110. But Defendants' own documents make clear that Countrywide denied Zachary's claims, and went out of its way to discredit Zachary, stating he was a disgruntled employee who had demanded a million dollars before he went public with the story. *Id.* As talk-show host Larry King put it according to Countrywide's own exhibit:

> Here is what Countrywide said – asked them for this, and they said, "while we cannot comment on pending litigation, we will say that during Zachary's employment with Countrywide, the company [investigated] each of his claims and found no merit to his accusations. Further, we can confirm Mr. Zachary's termination was performance related and not related to concerns he raised. Countrywide has a firm policy against any such action."

Id. Ex. 110. Such firm denials of wrongdoing plainly negate allegations of wrongdoing for determining constructive notice under the OSA. *See, e.g., In re Nat'l Century Fin. Enters.*, 755 F. Supp. 2d at 871.

Indeed, to this day, Countrywide continues to deny its mortgage underwriting misconduct, and to shift all blame onto the downturn in the real estate market. For example, in an October 5, 2011 oral argument in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 08/602825 (N.Y. Sup. Ct.) Countrywide asserted that MBS plaintiffs are "trying to take advantage of the recession and the mortgage market meltdown to avoid" their losses. Lysaght Decl. Ex. 2 at 62: 16-19. In October 2010, Brian Moynihan, CEO of Bank of America, sarcastically

demeaned MBS investors by comparing them to a car buyer who complains, "I bought a Chevy Vega but I want it to be a Mercedes." Lysaght Decl. Ex. 3 at 21; *see also id.* at 12 (October 19, 2010 statement by Bank of America CFO: "We believe many of the losses observed in these [MBS] deals have been, and continue to be, driven by external factors . . . diminishing the likelihood that any loan defect should one exist at all, was the cause of the loan's default.").

b. Complaints Involving Different Frauds Did Not Provide Constructive Notice

Countrywide attaches to its RJN a number of complaints filed in other actions. Many of these complaints involve claims brought by investors in Countrywide's common stock or equity securities. *See* Countrywide RJN Exs. 75-78, 80-84, 86, 88-91. Plaintiffs in those actions generally allege that Countrywide originated and kept on its books poor quality mortgage loans, and that Countrywide's lax origination guidelines caused losses to Countrywide equity investors. *Id.* Western & Southern alleges an entirely different fraud, namely that Countrywide off-loaded toxic loans onto MBS investors such as Western & Southern while "cherry picking" more creditworthy loans for its own account. Complaints ¶¶ 87-89. Under the OSA, a prior lawsuit does not trigger inquiry notice of a plaintiff's claims when it involved a distinct fraud. *See City of Painesville*, 178 F.R.D. at 195.

Countrywide also cites complaints by MBS investors asserting claims under the Securities Act filed before April 2009. Countrywide RJN Exs. 72-73. These complaints do not allege any fraud at all, relying instead on the strict liability provisions of the Securities Act. *Id.* Indeed, these investors specifically disclaimed any allegations that the Defendants acted knowingly. *Id.* Ex. 72 ¶ 87,

Ex. 73 ¶78. By definition, these complaints could not provide Plaintiffs with notice of their OSA claims. *See City of Painesville*, 178 F.R.D. at 195.[14]

c. Countrywide and Bank of America Fraudulently Concealed Their OSA Violations

Under Ohio law, the doctrine of equitable estoppel may be employed to prohibit the inequitable use of the OSA limitations periods. *See Helman v. EPL Prolong, Inc.*, 139 Ohio App. 3d 231, 246 (Ohio Ct. App., 7th Dist. 2002). Equitable estoppel may toll both the OSA two-year statute of limitations and the five-year statute of repose. *Id.* In order to allege tolling based on equitable estoppel, a plaintiff must assert that "'(1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) [that it induced] actual reliance which is reasonable and in good faith; and (4) [that the reliance caused] detriment to the relying party.'"). *Id.* (*quoting Doe v. Blue Cross/Blue Shield of Ohio,* 79 Ohio App. 3d 369, 379, 607 N.E.2d 492 (Ohio Ct. App. 10th Dist. 2000)).

The limitations period in O.R.C. § 1707.43(B) may also be tolled if a defendant fraudulently conceals its unlawful conduct. *See Lopardo v. Lehman Bros., Inc.*, 548 F. Supp. 2d 450, 466-67 (N.D. Ohio 2008); *In re Nat'l Century Fin. Enters.*, 541 F. Supp. 2d 986 at 1008 (S.D. Ohio 2007). In order to allege tolling based on fraudulent concealment, a plaintiff must assert that (i) the defendant wrongfully concealed its actions; (2) the plaintiff failed to discover operative facts that are the basis of his cause of action; and (3) the plaintiff exercised due diligence in seeking out facts supporting a cause of action. *See Iron*

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[14] Countrywide also cites Complaints by MBIA Insurance Corporation ("MBIA") and Syncora Guarantee Inc. ("Syncora"). Countrywide RJN Exs. 87, 95. However, MBIA and Syncora are monoline insurers that had access to relevant loan files. The Plaintiffs here never had access to loan files and, thus, cannot be expected to have learned through investigation the facts learned by MBIA and Syncora supporting their claims.

Workers Local Union No.17 Ins. Fund v. Philip Morris, Inc., 29 F. Supp. 2d 801, 808 (N.D. Ohio 1998).

The Complaint alleges that MBS trading seized up following the September 2008 Lehman Brothers bankruptcy. In response, using statistical metrics and guidance provided earlier by Countrywide, Plaintiffs developed an internal system to monitor their MBS investments (including the Certificates) and estimate their value based on projected cash flows. Complaints ¶ 376. At the time, there were no industry standards for analyzing MBS values according to cash flows or otherwise. *Id.* ¶¶ 381-82. Indeed, the National Association of Insurance Commissioners ("NAIC") recognized the need for such a pricing model, but did not develop one until late 2009. *Id.*

From the fall of 2008 through June 2009, Western & Southern utilized information in monthly Remittance Reports generated by Countrywide and Bank of America (after its acquisition of Countrywide) to monitor and value the Certificates through Western & Southern's internal system. *Id.* ¶¶ 374-78. Under item 1121 of SEC Regulation AB, such reports were to disclose, among other things, data on loan performance and modifications and "[m]aterial breaches of pool asset representations or warranties or transaction covenants." *See* 17 C.F.R. § 229.1121(a)(12) (attached as Exhibit 4 to the Lysaght Declaration). The Pooling and Servicing Agreements between loan servicers and the trusts that issued the Certificates include similar requirements. *See, e.g.,* Lysaght Decl. Ex. 5 §§ 2.03(c) at II-10, 4.06 at IV-7.[15]

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[15] Countrywide never disclosed any intention to change the substance of its Remittance Reports once the MBS trust ceased to be reporting entities. Accordingly, Western & Southern was entitled to assume the reports would continue to comply with Regulation AB consistent with past practice.

Moreover, Countrywide and certain of its affiliates were required to and did file with the SEC a signed certification attesting that they were responsible for assessing and did assess the servicing criteria in Schedule A to the certification. *See, e.g.,* Lysaght Decl. Ex. 6. In the Schedule, Countrywide, and later Bank of America, certified that it had directly assessed its compliance with numerous requirements, including that monthly Remittance Reports to investors were "in accordance with the transaction agreements and applicable Commission requirements." *Id.,* Schedule A at Reference 1122(d)(3)(i). Countrywide also certified that collateral on pool assets was maintained as required by the transaction agreements, and that pool assets and related documents were safeguarded. *Id.,* Schedule A at References 1122(d)(4)(i) and (ii).

Contrary to their certifications, the monthly Remittance Reports provided to Western & Southern and other investors in the Certificates never indicated (contrary to Commission requirements) that numerous representations in Certificate transaction documents were false, including representations that (i) no mortgage had a loan-to-value ratio greater than 100 percent, (ii) the origination, underwriting and collection practices used by Countrywide with respect to each mortgage loan were "legal, prudent and customary" in all respects, and (iii) each mortgage loan was underwritten in all material respects in accordance with underwriting guidelines as set forth in the Offering Documents. A representative copy of the relevant representations and warranties is attached hereto as Exhibit 5, Schedule III-A.

Nor did the Remittance Reports disclose that Countrywide had breached its covenant to deliver the complete mortgage file to the issuing Trustee as required by Section 2.01 of the relevant pooling and servicing agreements. Documents that were to have been delivered with the mortgage file included, among others, each original mortgage note and a duly executed assignment of mortgage (except in the

case of MERS loans). The failure to deliver this documentation has led to the highly-publicized inability of MBS trusts, including the Certificate trusts, to efficiently recover the mortgage collateral following borrower defaults, as discussed above in Section I(B)(1). Complaints ¶ 206. Instead, the Remittance Reports purported to confirm that there were no material breaches of representations regarding the mortgage collateral and most of the Certificates could pay out virtually all expected interest and principal payments. *Id.* ¶¶ 377-380.[16]

In sum, the Remittance Reports assured Western & Southern that Countrywide had carefully and faithfully originated and analyzed their mortgage loan pools, such that the pools' performance would be consistent with data presented to Western & Southern. Western & Southern reasonably relied on the Remittance Reports, and was thereby prevented from discovering the true nature of the mortgage loans underlying the Certificates. Western & Southern also exercised reasonable due diligence by diligently analyzing expected cash flows for valuation, regulatory and accounting purposes. Complaints ¶¶ 372-84.

For these reasons, under Ohio law, Western & Southern's OSA claims based on Countrywide's misrepresentations concerning adherence to underwriting guidelines were tolled until at least June 2009. *See e.g., In re Nat'l Century Fin. Enters.*, 541 F. Supp. 2d at 993, 1008 (fraudulent concealment where defendant gave false assurances about collateral underlying asset-backed securities); *Jelm v. Galan*, No. 58093, 1991 Ohio App. LEXIS 936, at *5-6, 19 (Ohio Ct. App. 8th Dist. 1991) (reassuring statements constituted fraudulent concealment); *see also Lybrand,* 137 Ohio App. 3d at 400 (plaintiffs satisfied due diligence by following

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[16] As now disclosed in connection with the settlement action filed in New York, Bank of America artificially indicated a greater recovery under the Certificates due to its poor servicing.

up with company and underwriters who provided reassuring statements concerning certain accruals and liabilities); *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2011 U.S. Dist. LEXIS 104419, at *49 (N.D. Ohio Sept. 15, 2011) (doctrine requires "reasonable diligence, not constant cynicism.").[17]

d. Western & Southern Was Not Aware That It Suffered Actual Injury Prior To April 2009

Under Ohio law, a cause of action does not accrue "until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, that he or she was injured by the wrongful conduct of the defendant." *Norgard v. Brush Wellman*, 95 Ohio St. 3d 165, 167 (Ohio 2002); *Ohio Civ. Rights Comm'n v. Triangle Real Estate Servs.*, No. 06AP-157, 2007 Ohio App. LEXIS 1639, at *25 (Ohio Ct. App., 10th App. Dist., Apr. 17, 2007) ("The discovery rule was designed to prevent unjust results when the wrongful act does not immediately result in injury or damage, such as in . . . fraud" cases.); *see also Moffitt v. Richard M. Hamlin Constr. Co.*, 29 Ohio App. 3d 98, 100 (Ohio Ct. App., 9th Dep't 1985) (injury is an essential element of common law fraud claims).

Western & Southern did not know, nor could it have known, prior to April 27, 2009 that Countrywide's misstatements concerning loan origination practices injured Western & Southern.[18] Western & Southern did not suffer any diminution

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[17] The Complaints further allege that Countrywide fraudulently concealed the existence of Plaintiffs' claims by engaging in a pattern of intimidation against employees who tried to blow the whistle on Countrywide's fraud. Complaints ¶¶ 132-144, 251-55, 259, 387; *see e.g., United States ex rel. Tillson v. Lockheed Martin Energy Sys.*, No. 00-CV-39-M, 2004 U.S. Dist. LEXIS 22246, at *8-11, 74-75 (D. Ky. 2004) (tolling based on fraudulent concealment where defendants concealed whistleblower reports).

[18] Western & Southern's Ohio common law fraud claims would also be timely under Section 1707.43(B) for the reasons set forth in Section I(B).

in interest or principal payments prior to February 2010, and only six of its 36 tranches have experienced such shortfalls since. Western & Southern Complaint ¶ 384. As a regulated entity, Western & Southern was (and is) required to monitor the Certificates and regularly evaluate whether they are impaired for the purposes of generally accepted accounting principals ("GAAP") and statutory accounting. Complaints ¶ 378. Western & Southern is generally required to recognize an impairment of a security when it becomes apparent that the security will result in a loss. *Id.* With the exception of nine tranches backed by subprime or second lien loans, Western & Southern did not determine that any of its senior Class A tranches were impaired for regulation purposes prior to June 2009. *Id.* ¶¶ 378-79, 383. As a result, the Complaints allege that the earliest date Western & Southern could have learned of its injuries was June 2009.[19]

3. The OSA Statute of Repose Is Not Applicable

None of Plaintiffs' OSA claims are barred by the OSA statute of repose because absolute statutes of repose are unenforceable under Article I, Section 16 of the Ohio Constitution ("All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay"). *See Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 48 (1987); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 57 (1987); *Metz v. Unizan Bank*, No. 05-CV-1510, 2008 U.S. Dist. LEXIS 37270, at *20 (N.D. Ohio May 5, 2008) ("[I]t appears most likely that the Ohio courts would find that the five year statute of repose contained in the Ohio securities statute violates the right-to-remedy clause of the Ohio Constitution. That provision is, therefore, unenforceable."); *see also Loyd v.*

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[19] The arguments in this Section are generally applicable to Western & Southern's Exchange Act claims based on misstatements regarding underwriting guidelines, and those claims are timely as a result.

Huntington Nat'l Bank, No. 08-CV-2301-DCN, 2009 U.S. Dist. LEXIS 51858, at *34 (N.D. Ohio 2009); *Lopard*, 548 F. Supp. 2d at 466. For this reason, any argument that the statute of repose in Section 1707.43(B) bars any of Plaintiffs' claims is without merit.

C. National Integrity's Common Law Fraud Claims Are Timely

Countrywide does not dispute that all of National Integrity's common law fraud claims are timely if National Integrity is a "resident" of New York within the meaning of New York Civil Practice Law and Rules ("NY CPLR") 202, New York's borrowing statute.[20] According to Countrywide, however, National Integrity is not a resident of New York because, although incorporated under New York law, its principal place of business is in Ohio.

Countrywide is plainly wrong. A New York corporation is a New York "resident" under NY CPLR 202, even if its principal place of business is outside the state. *See Wydallis v. United States Fidelity & Guaranty Co.*, 63 N.Y.2d 872, 873-75 (1984). The plaintiff in *Wydallis* was a New York corporation with its principal place of business in Massachusetts. *Id.* at 873-74. The New York Court of Appeals held that regardless of its Massachusetts place of business, the plaintiff was a resident of New York under NY CPLR 202 because it was incorporated under the laws of New

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[20] NY CPLR 202 provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

York. *Id.* at 875; *see also Verizon Directories Corp. v. Continuum Health Partners, Inc.*, 2010 NY Slip Op 4640, at 1 (N.Y. App. Div. 1st Dep't 2010) ("For purposes of CPLR 202, plaintiff is a 'resident' of . . . the state of its incorporation.").

Countrywide misreads *Antone v. General Motors Corp.*, 64 N.Y.2d 20 (1984). *See* Countrywide Mem. at 49. *Antone* was a products liability action arising out of a car accident in Pennsylvania. 64 N.Y.2d at 26. The plaintiff was an individual who lived in Pennsylvania, but maintained a post office box in the town of his former New York residence. *Id.* The Court of Appeals held that the plaintiff was not a "resident" within the meaning of NY CPLR 202, because he did not have "a significant connection with some locality in the State as the result of living there for some length of time during the course of a year." *Id.* at 30. The court's opinion says nothing about a corporation's residence under NY CPLR 202.[21]

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[21] Countrywide's reliance on *McMahon & Company v. Donaldson, Lufkin & Jenrette Securities Corporation*, 727 F. Supp. 833, 834 (S.D.N.Y. 1989) is similarly misplaced. *McMahon* involved a New York partnership, not a corporation and it failed to consider *Wydallis,* the controlling authority.

Allegaert v. Warren, 480 F. Supp. 817, 820 (S.D.N.Y. 1979) and *American Lumbermens Mutual Casualty Co. of Illinois v. Cochrane*, 129 N.Y.S.2d 489 (N.Y. Sup. Ct. 1954) provide no support for Countrywide's position because in each the plaintiff was incorporated outside New York. The cases, which both pre-date *Wydallis,* merely held that a foreign corporation with its principal place of business outside of New York is not a New York resident within the meaning of the borrowing statute.

1. The National Integrity Action Is Not "Procedurally Improper"

Countrywide asserts that this Court may dismiss the National Integrity Action as "procedurally improper." Countrywide is wrong.

A party that voluntarily dismisses itself from one action without prejudice may file a new action in a different forum regardless of its motivation for doing so. *See Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d 633, 638 (9th Cir. 1989); *Keystone Fruit Mktg. v. Nat'l Fire Ins. Co. of Hartford*, No. 10-CV-5145, 2011 U.S. Dist. LEXIS 83977, at *7 (E.D. Wash. Aug. 1, 2011). In *Nichols,* the FDIC voluntarily dismissed a state law action and the same day filed a substantively identical federal action. 885 F.2d at 635. The Ninth Circuit ruled that the district court abused its discretion in declining to exercise jurisdiction and dismissing the case for "improper forum shopping." *Id.* at 637. As the Court of Appeals held, principles of abstention do not apply when there is no concurrent state court proceeding, and a district court cannot decline jurisdiction merely because it believes a party to be forum shopping. *Id.*; *see also In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 219 (8th Cir. 1977) ("The effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought.")

The cases relied upon by Countrywide merely state that under certain circumstances a court may stay or dismiss one action if there is an entirely duplicative action involving identical parties proceeding concurrently in another forum.[22] Here, that is plainly not the case. National Integrity is a distinct legal

[22] The cases further state that even under such circumstances, dismissal is appropriate only in exceptional circumstances. Indeed, dismissal was denied in all but one of the cases. *See Curtis v. Williamson*, 226 F.3d 133, 141 (2d Cir. 2000) (reversing dismissal); *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 939 (Fed.

entity. It is not a plaintiff in the Western & Southern Action, and its claims are not asserted in the Western & Southern Action. Countrywide cites no case holding that a distinct legal entity injured by a defendant's conduct must join its corporate family in a litigation in a different forum. As pointed out in a case cited by Countrywide, such a rule "would make [Countrywide] the master of [National Integrity's] claim" contrary to Supreme Court precedent. *Merrick Bank Corp. v. Savvis Inc.*, No. 08-CV-675-ERW, 2008 U.S. Dist. LEXIS 99393, at *5; *see also The Fair Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings suit is master to decide what law he will rely upon.").[23]

Countrywide's attempt to characterize National Integrity's filing as improper "forum shopping" is without merit. National Integrity had every right to respond to this Court's holding in *Allstate* by filing a New York action to avail itself of its rights as a New York corporation. National Integrity never sought to extricate itself from this Court. As soon as the National Integrity Complaint was served, National Integrity and Western & Southern notified the MDL Panel that the National Integrity Action was related to the Countrywide MBS MDL. *See* Dkt.

Cir. 1993) (same); *Raniere v. Citigroup Inc.*, No. 11-CV-2448-RWS, 2011 U.S. Dist. LEXIS 135393, at *89 (S.D.N.Y. Nov. 22, 2011) (dismissal denied); *Merrick Bank Corp. v. Savvis, Inc.*, No. 08-CV-675-ERW, 2008 U.S. Dist. LEXIS 99393, at *17 (E.D. Mo. Dec. 8, 2008) (same); *Oglesby v. County of Kern*, No. 05-CV-873-REC, 2005 U.S. Dist. LEXIS 29363, at *28 (E.D. Cal. Nov. 4, 2005) (same); *Kellen Co., Inc. v. Calphalon Corp.*, 54 F. Supp. 2d 218, 222 (S.D.N.Y. 1999).

[23] Defendants contend that *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) (Friendly, J.) supports their position. *See* Countrywide Mem. at 41 n.45. But *Semmes* expressly contradicts Countrywide's argument by noting that if a plaintiff could have terminated its first filed action, the defendant would have no basis to argue for a stay or dismissal of the second filed action. 429 F.2d at 1202. The plaintiff did not have that procedural right because the defendant asserted a counterclaim. *Id.* n.7.

No. 143 (Notice of Related Case). The matter was transferred to this Court soon thereafter, as Plaintiffs always intended and expected. As for Countrywide's argument that the National Integrity Action and Western & Southern Action will be tried separately, National Integrity will agree to a transfer to Ohio for trial.[24]

D. The Civil Conspiracy Claims Are Timely

Under Ohio law, a conspiracy to violate the OCAA supports a civil conspiracy claim. *See Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 771, 795 (N.D. Ohio 1998). Countrywide does not dispute that Plaintiffs have asserted timely claims under the OCAA and, thus, their civil conspiracy claims are also timely.

Moreover, as set forth throughout Section I, Plaintiffs have asserted timely claims under both the OSA and common law fraud. These timely claims also support Plaintiffs' civil conspiracy claims. *See, e.g., Unencumbered Assets Trust v. JP Morgan Chase Bank (In re Nat'l Century Fin. Enters.)*, 604 F. Supp. 2d 1128, 1154 (S.D. Ohio 2009); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 29 F. Supp. 2d 801, 816 (N.D. Ohio 1998).

II. Plaintiffs' Securities Act and OSA Claims Are Tolled Under *American Pipe*

Under *American Pipe and Construction Company v. Utah*, 414 U.S. 538, 553 (1974) and its progeny, "'the commencement of the original class suit tolls the

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[24] Countrywide cites a number of cases that are irrelevant because they involved motions to transfer and did not address dismissal. *See Aguiar v. Natbony*, No. 10-CV-6531-PGG, 2011 U.S. Dist. LEXIS, at *33 (S.D.N.Y. May 16, 2011); *Dunn & Fenley, LLC v. Diederich*, No. 06-CV-6243-TC, 2010 U.S. Dist. LEXIS 326, at *23 (D. Ore. Jan. 5, 2010); *Am. Sign. Inc. v. Moody's Investors*, No. 09-CV-878-GLF, 2010 U.S. Dist. 68042, at *12 (S.D. Ohio July 2, 2010); *Italian Colors Restaurant*, No. 03-CV-3719-SI, 2003 U.S. Dist. LEXIS 20338, at *20 (N.D. Cal. Nov. 7, 2003).

running of the statute for all purported members of the class'" pending a determination on class certification. *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 531 (9th Cir. 2011) (*quoting American Pipe*, 414 U.S. at 553). The rule of *American Pipe* is grounded in two fundamental principles. First, class members should not be forced to file duplicative suits or motions to intervene, as the Rule 23 procedure is meant to promote "efficiency and economy of litigation." *Id.* (citation omitted). Second, because the initial class complaint provided notice of the class claims, "policies of ensuring essential fairness to defendants" must be satisfied. *Id.*

A. Eight of Plaintiffs' Tranches Are Backed by the Same Loan Pools as Tranches Purchased by the *Luther* Plaintiffs

Countrywide represents that the *Luther* plaintiffs purchased at least two tranches owned by Plaintiffs (CWALT 2005-26CB A6 and CWL 2006-S9 A3)[25] citing a filing made by the purported *Luther* plaintiffs in *Maine State*. *See* Countrywide Mem., Tabs 10-11; Countrywide RJN Ex. 102 at 4195. Thus, Countrywide in effect concedes that at least some of Plaintiffs' claims are tolled under this Court's prior rulings requiring for class action tolling, that a plaintiff demonstrate a named plaintiff in a class action had standing to assert the relevant claim. *See, e.g, Maine State I*, 722 F. Supp. 2d 1157, 1166-67 (C.D. Cal. 2010).[26]

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[25] Countrywide refers to this offering as "CWHEQ 2006-S9" which is another acronym used to describe the same offering. Because the Complaints utilize the "CWL" prefix, Plaintiffs will use the "CWL" prefix herein.

[26] Countrywide contends that the repose period for CWALT 2005-26CB A6 expired before a named plaintiff with standing to bring this claim was added to the *Luther* action. *See* Countrywide Mem. at 28-29. Not so. Under California law, the named plaintiff's claims related back to the date of the initial filing of the *Luther* action (November 14, 2007). *See Garnier v. Ludwick*, No. H024269, 2003 Cal. App. Unpub. LEXIS 7204, at *26 (Cal. App. 6th Dist. 2003) (when original named plaintiffs lacked standing to bring securities claims, new named plaintiff was added and claims were timely because they were tolled).

Plaintiffs also purchased six additional tranches (CWL 2006-S9 A4, CWL 2006-S9 A6, CWHL 2007-5 A5, CWALT 2005-46CB A14, CWALT 2005-54CB 1A4 and CWALT 2007-17CB M1)[27] backed by the ***same loan pools*** as tranches purchased by the *Luther* plaintiffs.[28] This Court's prior rulings do not foreclose that Plaintiffs may obtain tolling for these same-pool tranches.

Indeed, the Court observed in *Maine State Retirement System v. Countrywide Financial Corporation*, that "[t]he key to the standing issue is the significant differences between the underlying pools of mortgages." No. 11-CV-0302-MRP, 2011 U.S. Dist. LEXIS 125203, at *27-28 (C.D. Cal. May 5, 2011) (*Maine State III*).

> Because the loan groups backing the Certificates differed from tranche to tranche, the statements regarding underwriting and credit characteristics found in the prospectus supplements for those MBS deals were essentially different statements for each tranche, given that the point of reference for those statements—the loan groups—differed at the tranche level. In other words, an alleged misstatement as to the origination practices with respect to one loan group backing a particular tranche would not necessarily constitute a misstatement as

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[27] *See* Countrywide RJN, Ex. 102 at 4195 (CWHL 2007-5 A2), 4196 (CWALT 2005-46CB A20, CWALT 2005-54CB 1A7, CWALT 2005-J1 3A1, CWALT-17CB 1A3).

[28] *See* Lysaght Decl. Ex. 8 (CWL 2006-S9 backed by a single loan pool); *id.* Ex. 9 (same for CWHL 2007-5); *id.* Ex. 10 (same for CWALT 2005-46CB); Ex. 11 (Plaintiffs' CWALT 2005-54CB 1A4 tranche and *Luther* plaintiffs' 1A7 tranche both backed by Loan Group 1); Ex. 12 (Plaintiffs' CWALT 2007-17CB M1 tranche and *Luther* plaintiffs' 1A3 tranche both backed by Loan Group 1).

to a different loan group backing a different tranche. *In this case, the Court must view standing at the loan group level.*

Id. at *29-30 (emphasis added).

Defendants Sieracki, Spector, and Kurland argue that *Luther* cannot provide tolling beyond January 6, 2010, the date *Luther* was initially dismissed. *See* Sieracki Mem. at 36; Spector Mem. at 7 n.6; Kurland Mem. at 16. They are wrong. The *Luther* action was subsequently reinstated and continues to toll the limitations period with respect to Plaintiffs' claims. *See Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978) (en banc) ("[I]f a trial court's decision that the class may not be maintained is reversed on appeal, the status of class members is to be determined from the time that suit was instituted."); *Gelman v. Westinghouse Electric Corp.*, 556 F.2d 699, 701 (3d Cir. 1977) (same); *Jimenez v. Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975) (same); *Esplin v. Hirschi*, 402 F.2d 94, 101 n.14 (10th Cir. 1968) (same); *In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d 703, 709, 712-13 (N.D. Ohio 2010) (tolling applied during pendency of successful appeal of order compelling arbitration).[29] It is nonsensical to argue that a putative class action that is currently being litigated with some of the exact same offerings or loan pools at issue in this case cannot afford tolling under *American Pipe*.[30]

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[29] The cases cited by Defendants are inapposite because none involved a class action reinstated on appeal. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1379 (11th Cir. 1998); *Giovanniello v. ALM Media, LLC*, No. 09-CV-1409-JBA, 2010 U.S. Dist. LEXIS 92181, at *2 (D. Conn. Sept. 3, 2010); *Veliz v. Cintas Corp.*, No. 03-CV-1180-SBA, 2007 U.S. Dist. LEXIS 24428, at *22 (N.D. Cal. Mar. 20, 2007) (no appeal); *Womack v. UPS*, 311 F. Supp. 2d 492, 497 (E.D.N.C. 2004).

[30] *See, e.g., Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16, 29 (Cal. App. 3d Dist. 2001); *National Paint & Coatings Assn. v. State of California*, 58 Cal. App. 4th 753, 760-62 (Cal. App. 2d Dist. 1997).

Even if Plaintiffs' claims relating to their eight *Luther* tranches were not subject to tolling as a result of *Luther's* reinstatement, all such claims of Western & Southern and all but two of National Integrity would nevertheless be timely. The *Luther* plaintiffs filed the *Maine State* action and did not withdraw from that action until the filing of the First Amended Complaint on July 13, 2010. Thus, the claims relating to all eight tranches held by Plaintiffs were tolled until that date. *See* Appendix A.[31]

B. There Is a Strong Trend In Favor of the Application of *American Pipe* Tolling Notwithstanding that the Class Plaintiff Lacked Standing

Plaintiffs recognize that this Court previously ruled in *Maine State*, *Stitchting,* and *Allstate* that a party may seek tolling from *Luther* or *Maine State* only to the extent that a named plaintiff in either one of those cases purchased certificates in the same tranches, or in trances with the same loan pools as those purchased by the party. Plaintiffs respectfully submit that this Court should reconsider those rulings and find that both *Luther* and *Maine State* toll all of Plaintiffs' Securities Act claims. The majority of district courts and the two Circuit Courts that have considered the issue have held that a putative class

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[31] Similarly, the First Amended Complaint in *Maine State* demonstrates that the *Maine State* named plaintiffs purchased two tranches purchased by Western & Southern (CWALT 2007-5CB 1A13 and CWL 2007-11 2A1). *See* Lysaght Decl. Ex. 14 at ¶ 21. The First Amended Complaint in *Maine State* further reveals that the *Maine State* class plaintiffs purchased certificates from three offerings at issue in the Western & Southern Action (CWL 2006-S8 A2, CWL 2006-S9 A2, CWL 2007-11 2A1 and CWL 2007-S1 A1B). The tranches purchased by Western & Southern in these offerings were backed by ***exactly the same loan pools*** as the tranches purchased by the *Luther* plaintiffs. Indeed, each of these offerings involved a single loan pool. *Id.* Exs. 8-12. As a result, these tranches were subject to tolling from *Maine State* if deemed timely filed in *Maine State*.

member may obtain tolling under *American Pipe* notwithstanding that the original plaintiff lacked standing to bring the putative class member's claims.[32]

These courts have generally reasoned that a contrary rule "would be unduly harsh" because *American Pipe,* and Rule 23 encourage class members "to remain passive during the early stages of the class action." *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 2011 U.S. Dist. LEXIS 104280, at *53-54. As the court in *Morgan Stanley* recently explained:

> The Court is mindful that a blanket application of American Pipe tolling to cases where purported representatives lack standing holds the potential for abuse. There may be circumstances where the representative so clearly lacks standing that no reasonable class member would have relied. However, this is not such a case. The original complaint contained allegations that the harms of which Plaintiffs complain flowed from the registration statement as well as other offering documents. While this Court ultimately found that the

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[32] *See, e.g., McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 385 (3d Cir. 2002); *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *Genesee County Emps.' Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3*, No. 09-CV-300, JB/KBM, 2011 U.S. Dist. LEXIS 133462, at *198 (D.N.M. Nov. 12, 2011) (stating the majority rule and collecting cases); *In re Morgan Stanley Mortgage Pass-Through Certificates Litigation*, No. 09-CV-2137, 2011 U.S. Dist. LEXIS 104280, at *51-55 (S.D.N.Y. Sept. 15, 2011); *In re Deutsche Bank AG Sec. Litig.*, 2011 U.S. Dist. LEXIS 93867, at *19 (S.D.N.Y. Aug. 19, 2011); *In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 647 (S.D.N.Y. June 21, 2011); *see also In re Wachovia Equity Sec. Litig.*, No. 08-CV-6171, 2011 U.S. Dist. LEXIS 36129, at *102 (S.D.N.Y. Mar. 31, 2011); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 455-56 (S.D.N.Y. 2005); *Popoola v. Md-Individual Practice Ass'n*, 230 F.R.D. 424, 430 (D. Md. 2005); *In re Initial Public Offering Sec. Litig.*, No. 21 MC 92, 01-CV-9741 (SAS), 2004 U.S. Dist. LEXIS 26000, at *21 (S.D.N.Y. Dec. 27, 2004).

> original plaintiffs lacked standing to bring the claims in question, there was at least some authority as of December 2008 that indicated that a reasonable class member could have believed that MissPERS had standing to sue on behalf of purchasers from other trusts. *See, e.g., In re Countrywide Financial Corp. Securities Litigation*, 588 F. Supp. 2d 1132, 1165-66 (C.D. Cal. 2008) (plaintiffs have standing regarding later offerings from which they did not purchase securities because those offerings were based on the same initial registration statement) . . . .

In re Morgan Stanley Mortg. Pass-Through Certificates Litig., 2011 U.S. Dist. LEXIS 104280, at *54-56.

Under this reasoning, Plaintiffs' Securities Act claims are timely because Luther has been reinstated and the claims they all relate to MBS offerings that were included in *Luther*.[33] *See* Complaints ¶¶ 390-95; *Satterwhite*, 578 F.2d at 997 (when class action is reinstated class members claims are deemed tolled from the date suit was filed); *Gelman*, 556 F.2d at 701 (same); *Jimenez*, 523 F.2d at 696 (same); *Esplin*, 402 F.2d at 101 n.14 (same); *In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d at 709, 712-13 (tolling applied during pendency of successful appeal).

Virtually all of Western & Southern's Securities Act claims are also tolled by virtue of their inclusion in *Maine State*.[34] *Maine State* tolled Western &

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[33] This Court recognizes that *American Pipe* tolling applies to class actions filed in state court. *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010) (*Maine State I*). As this Court is aware, the *Luther* action was subsequently consolidated with *Washington State Plumbing & Pipefitting Pension Trust v. Countrywide Financial Corp.*, BC392571 (Cal. Super. Ct. 2008) which increased the number of MBS offerings included in *Luther*.

[34] National Integrity is not claiming that *Maine State* tolls its Securities Act claims.

Southern's claims with respect to 31 of its 36 tranches until this Court's dismissal on November 4, 2011. As set forth in Appendix B to this brief, 29 of Western & Southern's 36 tranches were offered publicly after May 7, 2005. As a result, the statute of repose had not run with respect to these claims when the Western & Southern Action was filed on April 27, 2011. *See* Appendix B.[35]

C. *American Pipe* Tolls the OSA Claims

An individual plaintiff's claims need not be identical to the claims asserted in a class action complaint in order for *American Pipe* tolling to apply. *Tosti v. Los Angeles*, 754 F.2d 1485, 1489 (9th Cir. 1985). When state law claims rely on the same evidence as the federal claims in a class action complaint, *American Pipe* tolls the state as well as the federal law claims. *See Cullen v. Margiotta*, 811 F.2d 698, 720-21 (2d Cir. 1987); *Newby v. Enron Corp. (In re Enron Corp. Secs.)*, 465 F. Supp. 2d 687, 718-719 (S.D. Tex. 2006) (same); *In re Linerboard Antitrust Litig.*, 223 F.R.D. 335, 352 (E.D. Pa. 2004) (same).

Plaintiffs' OSA claims indisputably involve the same evidence and witnesses as Plaintiffs' Securities Act claims. Accordingly, to the extent *American Pipe* tolls Plaintiffs' Securities Act claims, Plaintiffs' OSA claims are also tolled.

III. Western & Southern's OSA Claims Are Tolled Under Ohio Law

"Federal courts [applying state law] must abide by a state's tolling rules, which are integrally related to statutes of limitations." *Albano*, 634 F.3d at 530. In *Vaccariello* , the Ohio Supreme Court held "that the filing of a class action, whether in Ohio or the federal court system tolls the statute of limitations as to all

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[35] This Court and others recognize that the Securities Act's three-year statute of repose is subject to *American Pipe* tolling. *See, e.g., Maine State I*, 722 F. Supp. 2d at 1166; *see also Albano*, 634 F.3d at 535.

asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 94 Ohio St. 3d at 382-83. While *Vaccariello* discusses some federal case law, the Ohio Supreme Court emphasized that its decision announced a unique Ohio rule for Ohio claims, stating that "we reach our conclusion independently, without regard to the federal cases discussed as binding on this Court." *See id.* at 382.

Vaccariello applies tolling to "all asserted class members," so that "a plaintiff who could have filed suit in Ohio irrespective of the class action filed in federal court . . . [may] rely on that class action to protect her rights in Ohio." *Id.* at 383. The court reasoned that to hold otherwise "would encourage all potential plaintiffs in Ohio who might be part of a class action to file suit individually in Ohio to preserve their Ohio claims," thus defeating the efficiency purpose of federal class actions. *Id.* The court held that where a federal class action fails "otherwise than on the merits," the Ohio savings statute, (O.R.C. § 2305.19), applies, and allows a plaintiff one year from failure of the federal class action to file a new action asserting Ohio claims.[36] *Id.* at 383.

The Ohio Savings Statute, O.R.C. § 2305.19 provides, in relevant part, that "in any action . . . if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action within one year . . . or within the period of the original applicable statute of limitations, whichever occurs later." O.R.C. § 2305.19. "Ohio law thus provides for a kind of tolling that extends, rather than suspends, a statute of limitations." *Vaccariello*, 94 Ohio St. 3d at 392. If a plaintiff has commenced an action that fails otherwise than on the merits, and if the

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[36] The federal class action in *Vaccariello* failed due to denial of class certification. *Vaccariello*, however, quoting the Ohio savings statute, concludes that tolling applied because the failure of the class action was "otherwise than on the merits."

applicable limitation period for the action has expired, O.R.C. § 2305.19 permits the plaintiff to commence a new action within one year.

On November 4, 2010, Western & Southern's status as an asserted class member in *Maine State* failed due to lack of standing. Western & Southern filed this action on April 27, 2011, within one year of the failure of its status as an asserted class member. Under established Ohio law, when an action fails for lack of standing it is a failure "otherwise than on the merits." *See, e.g., State ex rel. Coles v. Granville*, 116 Ohio St. 3d 231, 241, 877 N.E.2d 968, 977 (Ohio 2007); *A-I Nursing Care v. Florence Nightingale Nursing*, 97 Ohio App. 3d 623, 627 N.E.2d 222 (Ohio 1994). Accordingly, Western & Southern's Ohio state claims were tolled by *Vaccariello,* and, under the Ohio savings statute, are deemed to have been filed on the same date as *Maine State* – January 14, 2010.

In contrast to cases decided under *American Pipe*, tolling under *Vaccariello* applies to all of Western & Southern's claims, including those requiring scienter, despite the fact that *Maine State* asserted only strict liability claims under the Securities Act. The Ohio savings statute applies "when the original suit and the new action are substantially the same," *Children's Hospital v. Ohio Dep't of Public Welfare*, 433 N.E.2d 187, 189 (Ohio 1982), but the question of whether actions are substantially the same, however, "largely turns on whether the original complaint and the new complaint contain similar factual allegations so that it can reasonably be said that the party or parties were put on fair notice of the type of claims that could be asserted." *Lanthorn v. Cincinnati Ins. Co.*, 2002 Ohio App. LEXIS 6573, *11 (Ohio Ct. App., 4th Dist. Dec. 5, 2002).[37]

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[37] The Ohio savings statute the statute is "'broad and unambiguous' and should be 'liberally construed in order that controversies . . . be decided upon important substantive questions rather than upon technicalities of procedure." *Kinney v. Ohio*

Given that Ohio law mandates liberal construction of the savings statute, Ohio courts have held that a new action asserts a claim that is substantially the same where, for example, the first action alleges negligent construction and the second alleges negligent supervision, the first action alleges wrongful death but fails to invoke the wrongful death statute and the second does, and where the second action adds allegations of "willful and wanton misconduct." *See Sherman v. Air Reduction Sales Co.*, 251 F.2d 543, 545-546 (6th Cir. 1958); *Zanders v. O'Gara-Hess & Eisenhardt Armoring Co.*, 1992 U.S. App. LEXIS 535, at *7 (6th Circuit 1992) (Sixth Circuit applied tolling doctrine to permit plaintiffs wrongful termination claim, even though plaintiff only timely filed his claim for wrongful suspension). Given that by the filing of *Maine State* on January 14, 2010 Countrywide had already been the subject of a criminal investigation and numerous regulatory and private civil proceedings alleging scienter-based claims relating to its MBS offerings, it cannot be seriously asserted that Countrywide was not on full notice of possible scienter-based claims on January 14, 2010. Thus, all of such Plaintiffs' claims under Ohio law are timely.[38]

Countrywide contends that *Vaccariello* does not apply because *Maine State* was not timely filed. Countrywide Mem. at 34. Countrywide utterly misreads *Vaccariello*. Since *Vaccariello* tolls the statute for *Ohio state claims* for putative members of a federal class, the question is whether such *Ohio state claims* were timely as of the date the federal class action was filed and tolling began. The Ohio

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Dep't of Administrative Services, 30 Ohio App. 3d 123, 126 (Ohio Ct. App. 1986) (*quoting Gruelich v. Monnin*, 50 N.E. 2d 310, 312 (Ohio 1943)).

[38] This Court has previously ruled that inquiry notice as to such claims accrued "in late 2007 or early 2008." *See, e.g, Maine State I*, 722 F. Supp. 2d at 1165. A further factual record must be developed before a precise date is determined. Western & Southern's claims requiring scienter were timely in January 2010.

state claims at issue were all clearly alive as of the filing of *Maine State,* at least for purposes of this motion. While Countrywide may believe that the tolling afforded by *Vaccariello* is too broad, this Court is required to apply Ohio law as it was written by the Ohio Supreme Court in *Vaccariello*, "without predicting potential changes in that law." *United States Fidelity & Guaranty Co. v. Lee Investments, LLC*, 76 Cal. Comp. Cases 472, 479 (9th Cir. 2011) (citation omitted).

Defendants' reliance on *Arandell Corporation v. American Electric Power Company*, No. 09-CV-231-MHW, 2010 U.S. Dist. LEXIS 96372 (S.D. Ohio Sept. 15, 2010) is also clearly misplaced. The federal court in *Arandell* declined to allow tolling because the class action that failed was originally filed in a foreign state court – and Ohio clearly does not allow cross jurisdictional tolling from a foreign-filed state action to Ohio. *Id.* at *28 (holding that the court "will follow the Supreme Court of Ohio's 'unambiguous holding that the savings statute is not to be applied to protect actions originally filed in other states'"). The court's suggestion that *Vaccariello* may not apply to failuresof class member status due to lack of personal jurisdiction is thus clearly dicta. *Id.* It is also plainly incorrect, as *Vaccariello* expressly incorporates the standard of a failure "otherwise than on the merits" set forth in the Ohio savings statute, and nowhere suggests that the savings statute may only apply where failure of the class action was due to denial of class certification. *Vaccariello*, 94 Ohio St. 3d at 382-83. Further, no Ohio court has adopted the reasoning of *Arandell,* and *Arandell* does not purport to address whether a plaintiff may obtain the benefit of Ohio's savings statute where, as here, it loses its status as a putative class member due to lack of standing.[39]

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[39] Defendants also rely upon *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005). While *Wyser* holds that a plaintiff who files an action during the pendency of a class certification loses tolling, courts in the Sixth Circuit do not apply *Wyser-Pratte* where, as here, no motion for class certification was

IV. This Court Has Personal Jurisdiction Over All of the Other Defendants

Defendants Mozilo, Sambol, Adler, Kripalani, Sandefur, Sieracki and Spector argue that this Court lacks jurisdiction over them in the Western & Southern Action because they lack sufficient contacts with the State of Ohio. Defendant Adler also contends that the National Integrity Action must be dismissed as to him because he lacks sufficient contacts with the State of New York. Defendant Kurland does not contest personal jurisdiction.

None of the Officer Defendants contend that this Court lacks jurisdiction over them if the Complaints assert timely federal claims. Thus, they concede their motions to dismiss must be denied if any of the federal claims against them survive. As set forth above, Plaintiffs have alleged timely Securities Act claims against all Officer Defendants, and timely Exchange Act claims against Defendants Mozilo and Sambol. Thus, the Officer Defendants' jurisdictional motions should be denied. They must also be denied for the following additional reasons.

A. The Tolled Tranches Provide Personal Jurisdiction

The Officer Defendants do not dispute that if a plaintiff in *Luther* purchased a tranche held by Western & Southern, their motions should be denied if (i) the repose period for filing a claim did not expire before April 27, 2011 (giving credit for applicable tolling); and (ii) the Officer Defendant either signed the relevant registration statement or is alleged to be a control person.

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pending at the time that the plaintiff filed its own action, or where the class certification issue will never be reached as to the putative plaintiff in question because the class action failed prior to certification on some other ground (such as lack of standing). *See, e.g., The Western and Southern Life Insurance Company v. Morgan Stanley Mortgage Capital, Inc.*, No. 1:11-cv-00576, 2011 U.S. Dist. LEXIS 146213, at *12 (S.D. Ohio Dec. 20, 2011); *In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d at 709, 712-13; *Chapman v. Hardin County*, No. 05-CV-433-S, 2006 U.S. Dist. LEXIS 47095, at *4-5 (W.D. Ky. May 15, 2006).

The *Luther* plaintiffs purchased CWL 2006-S9 A3, a tranche that was also purchased by Western & Southern. Defendants Sieracki and Spector signed the registration statement that facilitated this offering. Complaints ¶¶ 32, 35. They claim that the statute of repose with respect to claims related to CWL 2006-S9 A3 prior to the filing of the Western & Southern Action. However, this argument ignores the fact that the *Luther* action was reinstated and that "the status of class members is to be determined from the time that suit was instituted." *Satterwhite*, 578 F.2d at 997; *see also supra* Section II(A).[40]

B. Mozilo and Sambol Are Subject to Jurisdiction Under the OCAA

Mozilo and Sambol essentially concede for the purposes of this motion that they were members of an association-in-fact enterprise that committed numerous criminal acts in the state of Ohio and caused injuries in Ohio. *See* Complaints ¶ 421. The OCAA expressly provides for jurisdiction over all members involved in the conduct of an enterprise under the OCAA. O.R.C. § 2923.34(K). Mozilo and Sambol do not contest that Western & Southern's OCAA claims are timely and thus concede jurisdiction exists under O.R.C. § 2923.34(K).

C. Jurisdiction Exists Under Ohio's Long Arm Statute

Ohio's long arm statute provides, in relevant part:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state; . . . (6) Causing

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[40] As set forth in Section II(A), Western & Southern purchased several other tranches (CWL 2006-S9 A4, CWL 2006-S9 A6, CWHL 2007-5 A5, CWALT 2005-46CB A14, CWALT 2005-54CB 1A4 and CWALT 2007-17CB M1) which are backed by the same loan pools at issue in the *Luther* Action. Defendants Adler, Kripalani, Sandefur, Sieracki and Spector all signed registration statements related to these offerings. *See* Western & Southern Am. Compl. ¶¶ 32-37.

> tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state; . . . .

O.R.C. § 2307.382. The Officer Defendants are subject to jurisdiction in Ohio under the long arm staute because (i) this action arises out of their transaction of business within the state; and (ii) the Officer Defendants caused tortious injury in Ohio reasonably expecting that an investor in Ohio could be injured.

1. The Officer Defendants Transacted Business In Ohio

"It is clear that [O.R.C.] 2307.382(A)(1) . . . [is] very broadly worded and permit[s] jurisdiction over nonresident defendants who are transacting *any* business in Ohio." *Ky. Oaks Mall Co. v. Mitchell's Formal Wear*, 53 Ohio St. 3d 73, 75 (Ohio 1990). A lack of "physical presence in Ohio does not preclude a finding that [an individual] transacted business in this state." *Id.* at 53; *Javitch v. Neuma, Inc.*, No. 04-CV-1487, 2006 U.S. Dist. LEXIS 3561, at *11 (N.D. Ohio Jan. 31, 2006) ("direction of documents to Ohio" constitutes transacting business in Ohio).

Ohio courts have jurisdiction over a defendant who participated in the preparation of false financial information that is disseminated into the state. *See Goldstein v. Christiansen,* 70 Ohio St. 3d 232, 236-37 (Ohio 1994) ("dissemination of misleading financial information to Ohio investors" constituted transacting business in Ohio); *Athenian Venture Partners III, L.P. v. Infrastructure Solutions, Inc.,* No. 08-CV-821, 2009 U.S. Dist. LEXIS 48840, at *8-9 (S.D. Ohio May 19, 2009) (same). Here, the Complaints allege that each of the Officer Defendants was

actively involved in the dissemination of false Offering Materials in Ohio.[41] Accordingly, each of the Officer Defendants transacted business in Ohio.

Moreover, when a dispute involves a claim relating to securities, any officer that signed a securities filing necessary to facilitate the sale of a security in Ohio is subject to jurisdiction in Ohio. *See Blue Flame Energy Corp. v. Ohio Dep't of Commerce,* 171 Ohio App. 3d 514, 531-532 (Ohio Ct. App. 10th Dist. 2006) (defendant's "actions in his official capacity as the president of Blue Flame—specifically, his signature on the Form Ds" justified the "assertion of personal jurisdiction."). Defendants Adler, Kripalani, Sandefur, Sieracki and Spector all signed multiple registration statements that allowed Countrywide to offer the Certificates to Plaintiffs and, thus, transacted business in Ohio. *See* Complaints ¶¶ 32-37.

2. The Officer Defendants Caused Tortious Injury in Ohio

"Ohio courts seem to be quite willing to give a broad definition to tortious conduct." *Gor-Vue Corp. v. Hornell Elektrooptik AB*, 634 F. Supp. 535, 537 (N.D. Ohio 1986). Long arm jurisdiction exists over an officer of a corporation who allegedly violated securities law in connection with the issuance of securities by the corporation.[42]

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[41] *See* Complaints ¶¶ 33,179, 290, 303, 306, 463 (Kripalani); 32, 100, 179, 290, 300, 301, 463 (Sieracki); 35, 179, 290, 463 (Spector); 36, 179, 290, 463 (Adler); 37, 179, 290, 301, 463 (Sandefur); 5, 88, 97, 179, 290, 305-317 (Mozilo); 5, 87, 179, 193, 290, 323, 325, 330, 332 (Sambol).

[42] *See, e.g., Unencumbered Assets, Trust v. JP Morgan Chase Bank (In re Nat'l Century Fin. Enters.),* 617 F. Supp. 2d 700, 710 (S.D. Ohio 2009) (officer whose conduct allowed issuance of securities in Ohio is subject to long arm jurisdiction even if her acts occurred outside the state); *Ahrendt v. Palmetto Federal Sav. & Loan Asso.*, 680 F. Supp. 1125, 1128 (S.D. Ohio 1987) (similar holding); *Herbruck v. LaJolla Capital*, No. 19586, 2000 Ohio App. LEXIS 4668, 2000 WL 1420282 at *3 (Ohio Ct. App. 9th Dist. Sept. 27, 2000) (similar holding); *see also Ohio ex rel.*

The Officer Defendants argue that this Court lacks long arm jurisdiction under the fiduciary shield doctrine. They are wrong. The fiduciary shield doctrine does not apply when a corporate officer participated in alleged securities law violations. *See NPF XII, Inc. v. Special Care, Inc.*, No. 00-CV-1048, 2001 U.S. Dist. LEXIS 24351, at *16 (S.D. Ohio Feb. 13, 2001); *Heritage Funding & Leasing Co. v. Phee*, 120 Ohio App. 3d 422, 431 (Ohio Ct. App. 10th Dist. 1997).

The Complaints establish that each of the Officer Defendants participated in the OSA violations alleged in the Western & Southern Action. For example,

- Mozilo personally directed Countrywide Home Loans to approve any loan that could be off-loaded onto investors such as Western & Southern. Complaints ¶ 5. Mozilo was a member of Countrywide Financial's Executive Strategy Committee, Credit Committee, and Finance Committee, and, as CEO and Chairman of the Board, he oversaw the Ethics and Asset Liability Committees. *Id.* ¶ 28. Mozilo orchestrated Countrywide Financial's scheme to dominate the mortgage-lending market by abandoning underwriting standards, creating and selling fraudulent mortgage-backed securities, and engaging in various other wrongful acts. *See generally id.* ¶¶ 305-332.
- Sambol played a central role in bringing about the sweeping change that transformed Countrywide from a mortgage company with relatively prudent underwriting policies into an entity that originated virtually any loan that could be repackaged for investors. Complaints ¶¶ 323, 326. He expressly directed Countrywide employees "to price virtually any loan

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Dewine v. GMAC Mortg., LLC, No. 10-CV-2537, 2011 U.S. Dist. LEXIS 53449, at *4-7 (N.D. Ohio May 18, 2011) (Defendant caused tortious injury in Ohio by his acts in Pennsylvania (where he signed the allegedly false affidavits)).

that we reasonably believe we can sell/securitize without losing money, even if other lenders can't or won't do the deal." *Id.* ¶ 5; *see also id.* ¶¶ 323, 330.

- Sieracki authorized the dissemination of the Offering Materials relating to the Certificates. Complaints ¶¶ 32, 463. As member of the Asset/Liability Committee and Corporate Credit Risk Committee, he was responsible for managing fraud prevention and investigation, and protecting against risk. *Id.* ¶¶ 299-300.
- Spector authorized the dissemination of the Offering Materials. Complaints ¶ 35. He served as Executive Vice President of Secondary Markets, was promoted to Managing Director in 2001, and served as Senior Managing Director of Secondary Marketing at Countrywide Financial from 2004 to 2006. *Id.* As head of Secondary Markets, he was part of the Countrywide team that consciously endeavored to off-load toxic mortgage loans onto investors such as Western & Southern.
- Kripalani, President and CEO of both Countrywide Capital Markets and Countrywide Securities, authorized the dissemination of the Offering Materials relating to seven offerings at issue. Complaints ¶¶ 33, 303. His responsibilities included oversight of Countrywide Securities, Countrywide's underwriting arm. *Id.* ¶ 303. Kripalani allowed Countrywide Securities to ignore the gate-keeping function normally expected of underwriters in order to allow Countrywide to offload its toxic mortgages.
- Sandefur and Adler authorized the dissemination of the Offering Materials relating to seven offerings at issue. Complaints ¶¶ 36-37.

The Complaints further allege that the Officer Defendants sold an enormous amount of the stock of Countrywide at prices they themselves artificially inflated

and received multi-million dollar bonuses for their participation in the Countrywide fraud. Complaints ¶¶ 71, 179. These allegations are more than sufficient to establish Ohio long arm jurisdiction over all the Officer Defendants.

D. This Court's Exercise of Jurisdiction Satisfies Due Process

The Due Process Clause requires that a non-resident defendant have sufficient minimum contacts with the forum state such that imposition of personal jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Courts in the Ninth Circuit apply a three part test in determining whether the exercise of long arm jurisdiction comports with due process:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1077 (9th Cir. 2011).

The first prong of this test is satisfied in a securities action when the officer defendant signed the relevant registration statement, *see, e.g., In re LDK Solar Secs. Litig.*, No. 07-CV-05182 WHA, 2008 U.S. Dist. LEXIS 80717, at *16-17 (N.D. Cal. 2008), or was otherwise an active participant in the fraud, *see, e.g., Openwave Sys. v. Fuld,* No. 08-CV-5683-SI, 2009 U.S. Dist. LEXIS 48206, at

*34-35 (N.D. Cal. June 6, 2009).[43] As discussed above, the Officer Defendants each played a significant role in Countrywide's scheme to off-load toxic MBS on investors such as Western & Southern, and for this reason alone personal jurisdiction over the Officer Defendants in Ohio comports with due process. *See Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999) (corporate officers cannot "hide behind the corporation where [the officer was] an actual participant in the tort"); *j2 Global Communications, Inc. v. Blue Jay, Inc.*, No. 08-CV-4254, 2009 U.S. Dist. LEXIS 1616, 2009 WL 29905, at *5, 9 (N.D. Cal. Jan. 5, 2009) (jurisdiction where defendant directed agents to send fax advertisements to nationwide network of servers); *Openwave Sys.*, 2009 U.S. Dist. LEXIS 48206, at *34-35; *In re LDK Solar Secs. Litig.*, 2008 U.S. Dist. LEXIS 80717, at *16-17.[44]

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[43] Defendant Adler is the only defendant who contests New York's exercise of personal jurisdiction. His motion must be denied because under New York law, the signing of a registration statement is sufficient to confer personal jurisdiction. *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 399 ("The signing of documents filed with the SEC which form the basis for [p]laintiffs' claims is sufficient contact with the jurisdiction to justify this Court's exercise of jurisdiction over [defendant]"); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 305-06 (E.D.N.Y. 2002) (holding that the "signing the Registration Statement was enough to put the defendant on notice of potential suit in the United States and shows purposeful availment," thus conferring personal jurisdiction over defendant).

[44] Defendant Mozilo's reliance on *Indiana Plumbing Supply v. Standard of Lynn*, 880 F. Supp. 743 (C.D. Cal. 1995) is misplaced because the defendant was not alleged to have had any role in the underlying misconduct. Similarly, *Toyz, Inc. v. Wireless Toyz Franchise, LLC*, No. C-09-05091 JF, 2010 U.S. Dist. LEXIS 12032, at *24-25 (N.D. Cal. Jan. 25, 2010) and *Pebble Beach Co. v. Caddy*, 453 F.3d 1151 (9th Cir. 2006) are inapposite because the plaintiff did not allege that any act was directed to the relevant state.

Moreover, due process concerns are satisfied here for the Officer Defendants who signed registration statements, because by signing registration statements for securities that they knew would be offered to investors in Ohio, those Officer Defendants purposefully availed themselves of the privilege of conducting activities in the forum. *See, e.g., In re Medeva Sec. Litig.*, No. 93-CV-4376 KN, 1994 U.S. Dist. LEXIS 11675, at *18-19 (C.D. Cal. June 3, 1994) (purposeful availment met where defendant signed the registration statement); *In re CINAR Corp. Sec. Litig.,* 186 F. Supp. 2d at 305-06 ("signing the Registration Statement was enough to put the defendant on notice of potential suit in the United States and shows purposeful availment").[45]

The second prong of the Ninth Circuit jurisdictional due process test is satisfied if "[b]ut–for defendants' forum related conduct, the injury would not have occurred." *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.,* 328 F.3d 1122, 1131-32 (9th Cir. Cal. 2003). Defendants implausibly contend that their contacts with Ohio were not the "but for" cause of Western & Southern's claim. However, it is settled law in the Ninth Circuit that when a defendant orchestrated the alleged fraud or participated in the dissemination of misrepresentations, the "but for" prong is easily met. *See e.g., Rippey v. Smith*, 16 Fed. Appx. 596, 599 (9th Cir. 2001); *Harris Rutsky & Co. Ins. Servs.*, 328 F.3d at 1132 (same);

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[45] Defendants Adler, Sieracki, Mozilo and Spector's reliance on *New Mexico State Investment Council v. Countrywide Financial Corporation*, No. D-0101-CV-2008-02289 (N.M. Dist. Ct.), and Defendants Sieracki and Spector's reliance on *United Western Bank v. Countrywide Financial Corporation*, No. 2010-CV-3325 (C.O. Dist. Ct.) are misplaced, as the Colorado and New Mexico long arm statutes at issue in those cases are much narrower than Ohio's long arm statute. *See* C.O. ST § 13-1-124 and N.M. ST § 38-1-16.

Openwave Sys., 2009 U.S. Dist. LEXIS 48206, at *37 (same); *Anschutz Corp. v. Merrill Lynch & Co.*, 785 F. Supp. 2d 799, 828 (N.D. Cal. 2011) (same).

Finally, the third prong of the due process test is met as there is a presumption that the exercise of jurisdiction is reasonable when the first two prongs of the specific jurisdiction test have been met, as here. *See iYogi Holding Pvt. Ltd. v. Secure Remote Support, Inc.*, No. C-11-0592 CW, 2011 U.S. Dist. LEXIS 144425, at *28-29 (N.D. Cal. Oct. 24, 2011). "[T]he touchstone [of a court's inquiry] is whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). The Officer Defendants benefited from the sale of the Certificates in Ohio, and they were aware that the Certificates would be purchased by Ohio investors. In light of the Officer Defendants' active participation in the activities that caused Western & Southern's injuries in Ohio, the exercise of jurisdiction simply does not offend any notions of fair play and justice.

V. This Court Should Grant Plaintiffs Leave to Replead Any Claims This Court Dismisses

Under Federal Rule of Civil Procedure 15(a), leave to amend "shall be freely given when justice so requires." *See Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999). "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief." *Konig v. State Bar of Cal.*, No. 04-CV-2210, 2004 U.S. Dist. LEXIS 19498, at *14-15 (N.D. Cal. Sept. 16, 2004). Because Plaintiffs have never had the opportunity to address any inadequacies that may exist in their pleadings, leave should be granted. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034-35 (9th Cir. 2008) (district court abused its discretion when it dismissed a complaint without leave to amend before providing the

plaintiffs with an opportunity to explain how they could amend); *Ralston v. Mortgage Investors Group, Inc.*, C 08- 536 JF (RS), 2009 WL 688858, at *10 (N.D. Cal. Mar. 16, 2009); *Mathison v. Bumbo,* No. 08-CV-0369, 2008 U.S. Dist. LEXIS 108511, at *34 (C.D. Cal. Aug. 18, 2008).

CONCLUSION

For all of the foregoing reasons, Western & Southern and National Integrity respectfully submit that Defendants' partial motions to dismiss should be denied.

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APPENDIX A

Western & Southern

Offering/Tranche	Prospectus Supplement Date	Date Added to *Luther*	Days Elapsed Prior to Inclusion	Date Dismissed from Luther	Date Added to *Maine State*	Days Elapsed Prior to Inclusion	Date Dismissed From *Maine State*	Days Elapsed Prior to Filing of Western & Southern	Total Days Elapsed
CWALT 2005-26CB (A6)	5/24/2005	11/14/2007	904	1/6/2010	1/14/2010	8	11/4/2010	174	1086
CWALT 2005-46CB (A14)	8/29/2005	11/14/2007	807	1/6/2010	1/14/2010	8	11/4/2010	174	989
CWALT 2005-54CB (1A4)	9/27/2005	11/14/2007	778	1/6/2010	1/14/2010	8	11/4/2010	174	960
CWALT 2007-17CB (M1)	6/28/2007	9/9/2008	439	1/6/2010	1/14/2010	8	11/4/2010	174	621
CWHL 2007-5 (A5)	3/29/2007	9/9/2008	530	1/6/2010	1/14/2010	8	11/4/2010	174	712
CWL 2006-S9 (A3)[1]	12/28/2006	9/9/2008	621	1/6/2010	1/14/2010	8	6/6/2011	0	629
CWL 2006-S9 (A4)	12/28/2006	9/9/2008	621	1/6/2010	1/14/2010	8	6/6/2011	0	629
CWL 2006-S9 (A6)	12/28/2006	9/9/2008	621	1/6/2010	1/14/2010	8	6/6/2011	0	629

National Integrity

Offering/Tranche	Prospectus Supplement Date	Date Added to *Luther*	Days Elapsed Prior to Inclusion	Date Dismissed from Luther	Date Added to *Maine State*	Days Elapsed Prior to Inclusion	Date Dismissed From *Maine State*	Days Elapsed Prior to Filing of National Integrity	Total Days Elapsed
CWALT 2005-26CB (A6)	5/24/2005	11/14/2007	904	1/6/2010	1/14/2010	8	11/4/2010	370	1282
CWALT 2005-54CB (1A4)	9/27/2005	11/14/2007	778	1/6/2010	1/14/2010	8	11/4/2010	370	1156
CWALT 2007-17CB (M1)	6/28/2007	9/9/2008	439	1/6/2010	1/14/2010	8	11/4/2010	370	817
CWHL 2007-5 (A5)	3/29/2007	9/9/2008	530	1/6/2010	1/14/2010	8	11/4/2010	370	908
CWL 2006-S9 (A4)	12/28/2006	9/9/2008	621	1/6/2010	1/14/2010	8	6/6/2011	156	785
CWL 2006-S9 (A6)	12/28/2006	9/9/2008	621	1/6/2010	1/14/2010	8	6/6/2011	156	785

[1] Countrywide refers to this offering as "CWHEQ 2006-S9." Because the Complaints utilize the "CWL" prefix to describe the same offering, Plaintiffs will use the "CWL" prefix here.

Appendix B

MBS PURCHASED BY WESTERN & SOUTHERN

Offering/Tranche	Prospectus Supplement Date	Date Added to *Luther*	Days Elapsed Prior to Inclusion	Date Dismissed from *Maine State*	Days Elapsed Prior to Filing of Western & Southern Action	Total Days Elapsed*
CWALT 2005-10CB (1A8)	3/28/2005	11/14/2007	961	11/4/2010	174	1135
CWALT 2005-13CB (A8)	3/22/2005	11/14/2007	967	11/4/2010	174	1141
CWALT 2005-20CB (1A3)	5/25/2005	11/14/2007	903	11/4/2010	174	1077
CWALT 2005-20CB (1A4)	5/25/2005	11/14/2007	903	11/4/2010	174	1077
CWALT 2005-26CB (A6)*?	5/24/2005	11/14/2007	904	11/4/2010	174	1078
CWALT 2005-28CB (2A4)	6/27/2005	11/14/2007	870	11/4/2010	174	1044
CWALT 2005-30CB (1A6)	6/27/2005	11/14/2007	870	11/4/2010	174	1044
CWALT 2005-46CB (A14)	8/29/2005	11/14/2007	807	11/4/2010	174	981
CWALT 2005-47CB (A11)	8/25/2005	11/14/2007	811	11/4/2010	174	985
CWALT 2005-49CB (A3)	9/27/2005	11/14/2007	778	11/4/2010	174	952

* 3 years= 1095 days

** Defendants concede tolled by *Luther*.

Offering/Tranche	Prospectus Supplement Date	Date Added to *Luther*	Days Elapsed Prior to Inclusion	Date Dismissed from *Maine State*	Days Elapsed Prior to Filing of Western & Southern Action	Total Days Elapsed*
CWALT 2005-54CB (1A4)	9/27/2005	11/14/2007	778	11/4/2010	174	952
CWALT 2005-J1 (1A8)	1/26/2005	11/14/2007	1,022	11/4/2010	174	1196
CWALT 2006-14CB (A7)	4/25/2006	11/14/2007	568	11/4/2010	174	742
CWALT 2006-39CB (1A4)	11/29/2006	11/14/2007	350	11/4/2010	174	524
CWALT 2006-7CB (1A14)	3/29/2006	11/14/2007	595	11/4/2010	174	769
CWALT 2007-15CB (M)	5/31/2007	11/14/2007	167	11/4/2010	174	341
CWALT 2007-16CB (M1)	6/28/2007	9/9/2008	439	11/4/2010	174	613
CWALT 2007-17CB (M1)	6/28/2007	9/9/2008	439	11/4/2010	174	613
CWALT 2007-21CB (1A6)	7/27/2007	9/9/2008	410	11/4/2010	174	584
CWALT 2007-5CB (1A13)	2/26/2007	9/9/2008	561	12/6/2010	142	703
CWHL 2005-24 (A33)	9/27/2005	9/9/2008	1,078	11/4/2010	174	1252

* 3 years= 1095 days

** Defendants concede tolled by *Luther*.

Offering/Tranche	Prospectus Supplement Date	Date Added to *Luther*	Days Elapsed Prior to Inclusion	Date Dismissed from *Maine State*	Days Elapsed Prior to Filing of Western & Southern Action	Total Days Elapsed*
CWHL 2005-24 (A7)	9/27/2005	9/9/2008	1,078	11/4/2010	174	1252
CWHL 2005-25 (A6)	9/27/2005	9/9/2008	1,078	11/4/2010	174	1252
CWHL 2005-J2 (3A14)	6/29/2005	9/9/2008	1,168	11/4/2010	174	1342
CWHL 2006-21 (A15)	12/27/2006	9/9/2008	622	11/4/2010	174	796
CWHL 2007-14 (M)	7/27/2007	9/9/2008	410	11/4/2010	174	584
CWHL 2007-15 (M)	7/27/2007	9/9/2008	410	11/4/2010	174	584
CWHL 2007-5 (A5)	3/29/2007	9/9/2008	530	11/4/2010	174	704
CWL 2006-S8 (A4)	12/27/2006	9/9/2008	622	12/6/2010	142	764
CWL 2006-S9 (A3)*[1]	12/28/2006	9/9/2008	621	6/6/2011	0	621
CWL 2006-S9 (A4)	12/28/2006	9/9/2008	621	6/6/2011	0	621
CWL 2006-S9 (A6)	12/28/2006	9/9/2008	621	6/6/2011	0	621
CWL 2007-S1 (A5)	2/27/2007	9/9/2008	560	12/6/2010	142	702
CWL 2007-S2 (A5F)	3/29/2007	9/9/2008	530	11/4/2010	174	704
CWL 2007-11 (2A1)	6/28/2007	9/9/2008	439	12/6/2010	142	581
CWL 2007-4 (A5W)	3/28/2007	9/9/2008	531	11/4/2010	174	705

[1] Countrywide refers to this offering as "CWHEQ 2006-S9" which is another acronym used to describe the same offering. Because the Complaints utilize the "CWL" prefix, Plaintiffs will use the "CWL" prefix herein.

* 3 years= 1095 days

** Defendants concede tolled by *Luther*.